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Lab. No.	Agts. No.	% Moisture.
37227	146	16.11
37228	147	16.52
37229	148	16.51
37230	149	17.05
37231	150	16.64
37232	151	16.53
37233	152	17.06
37234	153	16.83
37235	154	16.29
37236	155	15.97
37237	156	16.96
37238	157	16.96
37239	158	17.36
37240	159	16.29
37241	160	17.08
37242	161	16.83
37243	162	17.29
37244	163	17.62
37245	164	17.07
37246	165	16.00
37247	166	16.50
37248	167	17.48
37249	168	16.76
37250	169	15.96
37251	170	17.41
37252	171	17.08

The examination of these samples proved the following to be normal butter: Lab. Nos. 37095, 37135, 37167, 37168, 37175, 37184, 37198, 37207, 37212, 37216, 37218, 37225, 37226, 37236, and 37250. The remaining one hundred fifty-six were all adulterated butter.

Respectfully,

(Signed) A. B. ADAMS
Chief Chemist.

(Endorsed): Stipulation to include additional matter in record. Filed in U. S. Circuit Court of Appeals on March 11, 1922.

293 United States Circuit Court of Appeals, Eighth Circuit.

Appearance of Mr. Alfred Jaques, United States attorney, as counsel for plaintiff in error.

Filed Feb. 11, 1912.

No. 6026.

[Title omitted.]

The clerk will enter my appearance as counsel for the plaintiff in error.

ALFRED JAQUES,
United States Attorney, Duluth, Minn.

[File endorsement omitted.]

Appearance of Mr. Miles J. Purcell, solicitor of internal revenue, as counsel for plaintiff in error.

Filed May 22, 1922.

The clerk will enter my appearance as counsel for the plaintiff in error.

MILES J. PURCELL,
New Interior Bld., Sol. Int. Rev., 18th & F Sts., Washington, D. C.

294 *Appearance of counsel for defendant in error.*

Filed Feb. 23, 1922.

The clerk will enter my appearance as counsel for the defendant in error.

WILLIAM H. OPPENHEIMER.
GEORGE W. PETERSON.
FREDERICK N. DICKSON.
FRANK C. HODGSON.

In U. S. Circuit Court of Appeals.

Order of submission.

May Term, 1922. Monday, May 22, 1922.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Alfred Jaques, United States attorney, for plaintiff in error, continued by Mr. George W. Peterson for defendant in error, and concluded by Mr. Miles J. Purcell for plaintiff in error.

Thereupon, this cause was submitted to the court on the transcript of the record from said District Court and the briefs of counsel filed herein.

295 United States Circuit Court of Appeals, Eight Circuit.

No. 6026.—May Term, A. D. 1922.

[Title omitted.]

Opinion.

Filed July 29, 1922.

Mr. Alfred Jaques, United States attorney, and Mr. Miles J. Purcell, Solicitor of Internal Revenue (Mr. Carl A. Mapes, Solicitor of Internal Revenue, and Mr. Malcolm A Coles, special attorney, Bureau of Internal Revenue, on the brief), for plaintiff in error.

Mr. George W. Peterson (Messrs. Moore, Oppenheimer, Peterson & Dickson, on the brief) for defendant in error.

Before Carland, circuit judge, and Trieber and Munger, district judges.

CARLAND, circuit judge, delivered the opinion of the court.

In this case the parties will be known as they were in the trial court. The plaintiff brought suit against defendant to recover certain stamp taxes paid under protest and assessed against it on the ground that it was a manufacturer of adulterated butter within the meaning of the act of Congress of May 9, 1902 (32 Stat. 193-5), and Regulation No. 9 promulgated July 2, 1907. On motion of counsel for plaintiff, the trial court directed a verdict in its
296 favor. Defendant has brought the case here assigning this ruling as error.

The statute defines one class of adulterated butter as follows:

"Or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream."

Regulation No. 9 reads as follows:

"The definition of adulterated butter as contained in the act of May 9, 1902, embraces butter in the manufacture of which any process or material is used whereby the product is made to 'contain abnormal quantities of water, milk, or cream,' but the normal content of moisture permissible is not fixed by the act. This being the case it becomes necessary to adopt a standard for moisture in butter which shall in effect represent the normal quantity. It is therefore held that butter having 16 per cent or more of moisture contains an abnormal quantity and is classed as adulterated butter."

It will be noticed that the statute provides that the process or material must be used with intent or effect of causing the "absorption" of abnormal quantities of water, milk, or cream. The regulation in an attempt to construe this definition declares that adul-

terated butter as defined in the statute quoted embraces butter in the manufacture of which any process or material is used whereby the "product is made to contain" abnormal quantities of water, milk, or cream. So far as the regulation differs from the statute, we must of course follow the latter.

The testimony taken at the trial showed that in August and September, 1918, plaintiff manufactured in its plant in St. Paul, Minnesota, 350 tubs of creamery butter in the usual way and shipped the same to the Chicago Cold Storage Co., Chicago, Ill. on September 28, 1918, where the butter was placed in storage. The officials of the Department of Internal Revenue upon tests of samples taken severally from the 350 tubs of butter so consigned found that samples from 156 tubs contained moisture amounting to 16% or more. The average moisture content in the 156 samples so tested was 16.76%. The testimony further showed that when this butter was manufactured by the plaintiff it was tested for its moisture content and that these tests showed that the butter
297 contained in the 350 tubs showed a moisture content ranging from 15% to 16%. The butter contained in the 156 tubs was seized by the Internal Revenue Department as adulterated butter, for the reason that the moisture content in the samples equaled or exceeded 16% in violation of regulation No. 9 above quoted. A stamp tax of ten cents per pound amounting to $936.00 was imposed by the Revenue Department, which plaintiff paid under protest. The usual application for a refund was made and upon denial of the application, this suit was commenced. The case of United States v. 11,150 Pounds of Butter, 195 Fed. 657, was an information by the United States to forfeit 11,150 pounds of butter claimed by the Milton Dairy Co. The trial court had dismissed the information (188 Fed. 157). This court in affirming the judgment of dismissal used the following language, which was concurred in by all the judges who sat in the case:

"Hence the burden was upon the libelant in this case to prove: (1) That such a process or such material was used in the manufacture or manipulation of the butter here in controversy; and (2) that it was used with the intent or the effect of causing the butter to absorb abnormal quantities of water, milk, or cream. The libelant produced no evidence to support these propositions, which it alleged in its pleading as the basis of its cause of action. The fact that the butter contained more than 16 per cent, or an abnormal quantity of moisture, was insufficient to sustain either of them. (3) The regulation of the Secretary in no way relieved the Government of the necessity of proving these allegations. The plain purpose and only effect of that regulation was merely to define and fix the measure of an abnormal quantity of moisture in butter under the statute at 16 per cent or more of the product. It was not the purpose of the Secretary, and it could not have been the effect of his regulation, to repeal or amend the portion of the clause in section 4 of the act of 1902, italicized in the last quotation, to enact the word 'containing' in its place

and thereby to add other classes of butter to those denounced as adulterated butter by the law, and other classes of manufacturers to those subject by the act of Congress to its drastic penalties. United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. Ed. 37; United States v. Ninety-Nine Diamonds, 72 C. C. A. 9, 12, 13, 139 Fed. 961, 964, 965, 2 L. R. A. (N. S.) 185; St. Louis Merchants' 298 Bridge Terminal Ry. Co. v. United States, 188 Fed. 191, 193, 110 C. C. A. 63. The result is that the evidence in this case was insufficient to warrant a verdict for the Government, and for that reason there was no error in the dismissal of the suit."

The plaintiff in this case had the burden of showing that it did not do the things which the court held in the case cited was necessary for the libelant to show that the Milton Dairy Co. did, and we are of the opinion that such burden was fully met, as after a careful reading of the evidence we can not find any evidence that would be sufficient to sustain a verdict that a process or material was used by plaintiff in the manufacture or manipulation of the butter in question with intent or effect of causing such butter to absorb abnormal quantities of water, milk, or cream. The mere fact that an average of 16.76% of moisture was found in the butter standing alone would not show a violation of the statute as decided in the case above mentioned, in view of the fact that the process of making butter, speaking generally, consists in the elimination of moisture from cream or milk which moisture averages in milk from 86 1/2 to 87% and in cream is about 65%.

The evidence shows that after the butter fat is, by the process of churning, separated from the buttermilk, it is washed with water for the purpose of eliminating any buttermilk still in the butter fat. This is the universal practice and as the evidence shows is necessary, but if we concede the moisture found in the butter in question came from this source, there is no evidence that the plaintiff used the water with intent or effect to cause the butter to absorb an abnormal quantity of water. The law says that the process or material must be used with the intent or effect. We know the meaning of the word "intent" but the word "effect" following the word "intent" does not mean that if you find an abnormal quantity of moisture in butter that you may assume without evidence that the manufacturer used a process or material with the intent or effect of causing the butter to absorb abnormal quantities of water, milk, or cream. Whatever is effected, is the consequence of a specific design. It always requires therefore a rational agent to effect anything. So that the words "intent" and "effect" as used in the statute mean practically the same thing. We find it unnecessary in our view of 299 the evidence to determine whether Regulation No. 9 is valid or not for the reason that conceding it to be valid so far as creating a standard is concerned, there is no evidence in the record that the average moisture found in the butter got there by the intentional or effective use of a process or material by plaintiff which

caused the butter to absorb such moisture. The views above expressed render it unnecessary to consider other assignments of error.

Judgment below affirmed.

300 United States Circuit Court of Appeals,
Eight Circuit.

Judgment.

May Term, 1922.—Saturday, July 29, 1922.

In error to the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed with costs; and that the Tilden Produce Company have and recover against Margaret C. Lynch, executor of the last will and testament of E. J. Lynch, deceased, the sum of twenty-six and no/100 dollars for its costs in this behalf expended, the same to be collected according to law.

JULY 29, 1922.

301 United States Circuit Court of Appeals.

May Term, A. D. 1922.

No. 6026.

In error to the District Court of the United States for the District of Minnesota, Third Division.

Petition for rehearing.

Filed Sept. 5, 1922.

Margaret C. Lynch, executor of the last will and testament of E. J. Lynch, collector of internal revenue, deceased, plaintiff in error, respectfully petitions and prays this court that a rehearing be
302 granted of the decision of this court, handed down and filed on the 29th day of July, A. D. 1922, and for the following reasons:

First. The court erred in failing to pass upon the validity of regulation number nine.

Regulation No. 9 (revised), approved July 2nd, 1907, relating to adulterated butter, was promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury and the Secretary of Agriculture. Manufacturers of butter are so numerous and the industry is so extensive within the Eight Judicial

Circuit that the efforts of the Government to regulate the moisture content by preventing the manufacture of butter containing moisture in excess of the standard established by regulation number nine will be practically fruitless, unless the validity of said regulation is sustained by the Supreme Court of the United States. A conflict of decisions exists between the Circuit Court of Appeals for the Eight Judicial Circuit where this regulation was held to be invalid in the case of United States vs. 11,500 Pounds of Butter, 195 Fed. 657, and the Circuit Court of Appeals for the 6th Judicial Circuit in the case of Coopersville Cooperative Creamery Company vs. Lemon, 163 Fed. 145. Owing to the fact that the case of United States vs. 11,500 Pounds of Butter was in the nature of a criminal proceeding it was not deemed by the Government as a suitable case in which to
303 have the validity of regulation number nine finally determined and therefore was not taken up within the time permitted under the rules. There are now pending in various district courts within the several Federal circuits a number of cases involving the validity of this particular regulation which would be controlled by decision of this case in the United States Supreme Court. The Commissioner of Internal Revenue has felt that in order to prevent a further multiplicity of litigation and to clarify the present situation created by the two conflicting decisions above cited that an early determination of the question as to validity of regulation number nine is imperative. The present case, which is a typical action to recover taxes assessed and collected, is regarded as an appropriate one in which to have the validity of said regulation finally determined. By its recent decision in the present case, however, filed July 29th, 1922, the court has failed to pass upon the question of the validity of said regulation number nine, thereby rendering the efforts of the Government to regulate the manufacture of adulterated butter in the Eight Judicial Circuit practically futile, and unless that decision can be so modified upon a rehearing so as to include a ruling upon said regulation it will be practically useless to ask for a review of this case by the Supreme Court of the United States. Furthermore, unless a ruling upon the validity of said regulation can be obtained in this case upon rehearing, unnecessary and irreparable loss will be experienced
304 by the Government in attempting to enforce said statute since the consequent delay caused by the loss of time in which another case might be perfected in some other circuit would postpone the final determination of the validity of said regulation and thus continue the existing unsettled status of the matter in its application to the industry of manufacturing butter.

Second. The court erred in its interpretation of the words "effect" in the Act of May 9th, 1902.

In its recent opinion of the present case hereinbefore referred to and in its interpretation of the act of Congress approved May 9th, 1902 (32 Stat, 193), this court has construed the words "intent" and "effect" as synonymous. It is the view of the plaintiff in error that the interpretation thereby placed by this court in this case upon

those words in the statute is unwarranted for the reason that said statute is believed to have been intended to cover two phases of operation in connection with the manufacture of adulterated butter, one where the law was violated by intent and the other where it was violated as a result or consequent effect accomplished through carelessness, ignorance, or other cause which constituted a failure to keep within the established standard of moisture content, and that any other interpretation would practically destroy its serviceability in the effort to regulate the manufacture of adulterated butter.

305 Wherefore, your petitioner prays that a rehearing be granted and your petitioner will ever so pray.

LAFAYETTE FRENCH, Jr.,
Attorney for Plaintiff in Error and
United States Attorney, St. Paul, Minn.

CARL A. MAPES,
Solicitor of Internal Revenue.
MALCOLM A. COLES,
Special Attorney, Bureau of Internal Revenue, of counsel.

Certificate.

I, Lafayette French, jr., attorney for plaintiff in error, and United States attorney, do hereby certify that in my opinion the foregoing petition for a rehearing in said cause is well founded and is not made for the purpose of delay.

LAFAYETTE FRENCH, Jr.,
Attorney for Plaintiff in Error and
United States Attorney.

Dated August 31st, 1922.

[File endorsement omitted.]

306 In U. S. Circuit Court of Appeals.

Order denying petition for rehearing.

September Term, 1922.—Thursday, September 14, 1922.

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for plaintiff in error.

On consideration whereof it is now here ordered by this court, that said petition for a rehearing of this cause be, and the same is hereby, denied.

SEPTEMBER 14, 1922.

307 United States Circuit Court of Appeals, Eighth Circuit.

Clerk's certificate.

I, E. E. Koch, clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing con-

tains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Margaret C. Lynch, executor of the last will and testament of E. J. Lynch, deceased, was plaintiff in error, and the Tilden Produce Company was defendant in error, No. 6026, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the fourth day of October, A. D. 1922, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the District of Minnesota.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this eighteenth day of October, A. D. 1922.

[SEAL.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

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309 *Writ of Certiorari and Return Filed December 26, 1922.*

In the Supreme Court of the United States.

[Title omitted.]

October Term, 1922.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit to the writ of certiorari granted therein.

JAMES M. BECK,
Solicitor General.
GEORGE W. PETERSON,
Counsel for Respondent.

DEC. 6, 1922.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit, No. 6026. Margaret C. Lynch, executor, etc., plaintiff in error, vs. Tilden Produce Company. Stipulation as to return to Writ of Certiorari. Filed Dec. 19, 1922, E. E. Koch, Clerk.

310 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Margaret C. Lynch, executor of the last will and testament of E. J. Lynch, deceased, is plaintiff in error, and Tilden Produce Company is defendant in error, No. 6026, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Minnesota, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
311 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

312 *Return to writ.*

UNITED STATES OF AMERICA, EIGHTH CIRCUIT, *ss:*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Margaret C. Lynch, executor, etc., plaintiff in error, v. Tilden Produce Company, No. 6026, is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this 19th day of December, A. D., 1922.

[SEAL] E. E. KOCH,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

[File endorsement omitted.]

○

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

MARGARET C. LYNCH, EXECUTRIX OF THE Last Will and Testament of E. J. Lynch, Collector of Internal Revenue, deceased, petitioner,

v.

TILDEN PRODUCE COMPANY.

No. —.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

The Solicitor General on behalf of Margaret C. Lynch, as executrix of the will of E. J. Lynch, formerly collector of internal revenue, deceased, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit rendered in the above case on July 29, 1922, affirming the judgment of the District Court for the District of Minnesota, Third Division.

STATEMENT.

This is an action brought by the Tilden Produce Company to recover from the collector of internal revenue the sum of nine hundred thirty-six ($936.00)

dollars, with interest at the rate of 6 per cent from December 11, 1918, representing stamp taxes assessed against and collected from it on account of the manufacture by it of 9,360 pounds of butter which was seized as adulterated butter and therefore subject to the tax of 10 cents per pound on adulterated butter imposed by the act of Congress approved May 9, 1902 (32 Stat. 193), and regulation 9, approved July 2, 1907. The company paid the tax under protest and filed claim for refund of the amount paid, and upon the claim being rejected by the Commissioner of Internal Revenue brought this suit.

QUESTION INVOLVED.

The question here involved is whether or not regulation 9, made in pursuance of the act of May 9, 1902, defining what is an abnormal amount of moisture content in butter, is valid and reasonable.

REASONS FOR GRANTING THE PETITION.

(1) The Circuit Court of Appeals erred in holding that the words "intent" and "effect" as used in the statute mean the same thing, and that, if more than sixteen per cent of the butter content was water which came as a result of washing the butter with water for the purpose of eliminating any buttermilk still in the butter fat, there was no evidence that the water was used with intent or effect to cause the butter to absorb this abnormal quantity of water.

(2) The Circuit Court of Appeals erred in holding that it was unnecessary to determine whether regula-

tion 9 is valid or not, for the reason that there is no evidence that the moisture found in the butter got there by the intentional or effective use of a process or material which caused the absorption of such moisture.

(3) The decision of the Circuit Court of Appeals is in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Coopersville Cooperative Creamery Company* v. *Lemon*, 163 Fed. 145.

(4) This department is advised that there are also a number of cases pending in the District Courts within the Eighth Circuit which involve the same questions presented in the case at bar, so that a decision by this court herein would serve as a precedent in the disposition of such pending litigation.

BRIEF IN SUPPORT OF THE PETITION.

I.

Congress has delegated the power to make the regulation in question.

The act of May 9, 1902 (32 Stat. 193), is an act which amends the oleomargarine act of August 2, 1886 (24 Stat. 209), and provides in part as follows:

> SEC. 4. That for the purpose of this Act "butter" is hereby defined to mean an article of food as defined in "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August second, eighteen hundred and eighty-six; that

"adulterated butter" is hereby defined * * *.

* * * any butter in the manufacture or manipulation of which any process or material is used with the intent or effect of causing the absorption of abnormal quantities of water, milk, or cream.

Manufacturers * * * of adulterated butter shall pay six hundred dollars per year. Every person who engages in the production of * * * adulterated butter as a business shall be considered to be a manufacturer thereof.

That upon adulterated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof, and any fractional part of a pound shall be taxed as a pound.

That the provisions of sections * * * fourteen * * * and twenty * * * of "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August second, eighteen hundred and eighty-six, shall apply to manufacturers of "adulterated butter" to an extent necessary to enforce the marking, branding, *identification*, and regulation of the exportation and importation of adulterated butter. (Italics ours.)

Section 14 of the act of August 2, 1886, provides, in part:

And such commissioner is authorized to decide what substances, extracts, mixtures,

> or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; *and his decision in matters of taxation under this act shall be final.* (Italics ours.)

Section 20 of the act of August 2, 1886, provides:

> That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act.

It will thus be seen that section 4 of the act of 1902 specifically adopted sections 14 and 20 of the act of 1886, delegating to the Commissioner the power to make, with the approval of the Secretary, all needful regulations for the carrying into effect of the act.

II.

Regulation No. 9 was made in pursuance of the delegated authority, and is both reasonable and valid.

Regulation No. 9 (revised), approved July 2, 1907, relating to adulterated butter, and promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury and the Secretary of Agriculture, provides, so far as is here pertinent, as follows (pp. 152–153):

> The definition of adulterated butter as contained in the act of May 9, 1902, *embraces butter in the manufacture of which any process or material is used whereby the product is made to "contain abnormal quantities of water, milk, or*

> *cream,*" but the normal content of moisture permissible is not fixed by the act. This being the case, it becomes necessary to adopt a standard for moisture in butter, which shall, in effect, represent the normal quantity. *It is therefore held that butter having sixteen per cent or more of moisture contains an abnormal quantity and is classed as adulterated butter* (Italics ours.)

A consistent examination of the regulation in question will show that it was not unreasonable or arbitrary. It violates no provision of the act; it does not go beyond the scope or purpose of the law and does not extend or limit its application. On the contrary it is made in accordance with and pursuant to the provisions of the act. It is the duty of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to see that the revenue laws are properly enforced and executed, and to this end he is authorized to make all reasonable regulations. (See secs. 251, 321, and 3447, R. S.)

In *United States* v. *Grimaud,* 220 U. S. 506, a case very analogous to the instant case as to facts and law, it was said (p. 517):

> From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. * * * But when Congress had legislated and indicated

> its will, *it could give to those who were to act under such general provisions "power to fill up the details."* (Italics ours.)

It was further said (p. 521):

> *But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.* (Italics ours.)

The only effect of the regulation in question has been to give a clear definition to the word "abnormal" used in the act. It does not go beyond the scope or purpose of the act, nor extend, limit, modify, or violate any of its provisions. It gives force and effect to the act, as intended by Congress, and made its enforcement more practical and efficacious by establishing throughout the United States a uniform standard as to the abnormal moisture content of butter, and classified butter having such abnormal content as adulterated butter.

The regulation in question does not fix the normal content of moisture in butter but fixes the limit of its abnormalcy above the average or normal as found or determined in a great number and variety of samples of butter tested. It allows those manufacturers of butter which contains a normal content of moisture to remain without the class of manufacturers of adulterated butter.

The Commissioner of Internal Revenue, in fixing 16 per cent or more as the abnormal moisture con-

tent in butter, established the limit at a point sufficiently abnormal as to be well beyond the average or normal content above which the manufacturer would be taxable. It gave the manufacturer of butter an ample opportunity for safety if fairly observed. If some of them had not recklessly approached too near to the limit in order to secure undue profits, they could have escaped the tax.

In view of the foregoing, it is contended that the regulation must necessarily be held to be valid, reasonable, and fair and not an arbitrary exercise of the authority which was delegated to the commissioner and the Secretary by Congress to carry out the purposes of the act.

III.

An abnormal amount of moisture having been caused by washing with water, the butter should be classed as "adulterated butter."

The definition of "adulterated butter," as set out in section 4 of the act of 1902, is:

> Any butter in the manufacture or manipulation of which any process or material is used with the intent or effect of causing the absorption of abnormal quantities of water, milk, or cream.

The process used in this case, namely, the washing of the butter with water, had the "effect," whether or not the "intent" was there, of causing the absorption of an amount of water, which, under regulation 9, is abnormal, that is 16 per cent or more, and there-

fore caused the product to be classed as adulterated butter, and subject to the tax of ten cents per pound.

The words "intent" and "effect" in law are not synonymous. "Intent" implies the state of mind in which or the purpose with which one does an act; design; determination. On the other hand, the word "effect" connotes accomplishment; fulfilment; consequence.

In *Coopersville Cooperative Creamery Company* v. *Lemon*, 163 Fed. 145, the Circuit Court of Appeals for the Sixth Circuit, in affirming the judgment of the District Court upholding regulation 9, promulgated under the act of May 9, 1902, announced approval of that part of the charge of the lower court upon the subject of "intent," which reads as follows:

> Then the expression "any process" used: Now, that does not mean necessarily that there has to be some special fraudulent process of making the butter, but if the process of making, whether by too little washing or too much washing, or too little churning or too much churning, or whatever it is that has the effect of leaving an abnormal quantity of water in the butter, it is within the statute, and within the prohibition of the statute. And again as to the intent: In this case, it is not material what the intent of the Coopersville Cooperative Creamery Company was—whether the Coopersville Cooperative Creamery Company intended to have an undue amount of water left in its butter. If the

process as employed did have that effect, the company was just as much liable for that tax as if it did it intentionally, because it is the object of the law to prevent that thing being done.

CONCLUSION.

It is respectfully submitted that the writ of certiorari should be issued as prayed.

JAMES M. BECK,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
G. NOBLE JONES,
Special Assistant to the Attorney General.

OCTOBER, 1922.